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NO. 84-893

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1984

THE OMEGA CORPORATION OF CHESTERFIELD,

Petitioner,

v.

D. DUANE MALLOY, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

REPLY BRIEF

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QUESTION PRESENTED

I. WHETHER IT IS A DENIAL OF EQUAL PROTECTION FOR A STATE COURT TO ENFORCE A SINGLE-FAMILY DEED RESTRICTION SO AS TO ALLOW HOUSEHOLDS SUCH AS THREE UNRELATED SCHOOLTEACHERS AND HOUSEHOLDS CONTAINING MAIDS, GOVERNESSES AND THE LIKE WHILE PROHIBITING HOUSEHOLDS OF FOUR MENTALLY RETARDED PERSONS LIVING WITH COUNSELORS WHO SERVE AS SURROGATE PARENTS?

PARTIES

Petitioner, The Omega Corporation of Chesterfield, is a private, non-profit Virginia corporation with no parent company, subsidiaries or affiliates. Respondents are the following individuals: D. Duane Malloy, Cynthia R. G. Malloy, Frank Barone, Diane Barone, Vernleigh H. Morton, Alfrieda T. Morton, Norbert S. Keeney, Evelyn V. Keeney, William R. Hill, III, Louis W. Headley, Sr., Eileen H. Headley, Virginia B. White, Davene S. Winters, Kenneth D. Dotson, Judith H. Dotson, Wyatt D. Mitchell, Amy L. Hofmann Mitchell, Jeffrey R. Cosgrove, Lorraine M. Cosgrove, Marvin O. Lindsey, Ken A. Clayton, Gail A. Clayton, Robert Lee Cobb, Beverly B. Cobb, Peter Sattelmayer, Theresa Sattelmayer, Elwood G. Everington, Frances Everington, D. Allen White, Pam White, Marvin W. Bubie,

Rebecca D. Bubie, Stephen H. Grayberg, Ruth Grayberg, R. J. Rountree, Brenda Rountree, James Phillips, Jr., Sandy Phillips, E. S. Kile, Teresa T. Kile, John O. Stein, II, Geraldine G. Stein, William R. Petzold, Patricia A. Petzold, Paul E. Walsh, Jr., Beverly B. Walsh, Randy B. Cox, Fay C. Cox, D. C. Foxx, R. T. Foxx, Dorothea M. Smith, A. J. Christopher Wood and David A. Schneider.

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Pressing as their first line of attack that Petitioner has waived its equal protection claim, Respondents implicitly concede that the equal protection claim was discussed during oral argument before the

Virginia Supreme Court. Clearly, the constitutional claim was not waived as Respondents and the Virginia Supreme Court would have this Court believe. According to Chief Justice Carrico's majority opinion, Omega's equal protection claim was waived because it

> Was neither discussed nor expressly reserved at oral argument.

Pet. App. at 20a. However, counsel for respondents himself discussed Omega's equal protection claim:

> The mere fact that appellant makes the argument about the equal protection under the laws cases gives me a great deal of concern. The Texas case in Shaver v. Hunter says that what in that instance, what the people who wanted to build a group home for three mentally retarded ladies with a counselor wanted them to say, was we can enforce this restrictive covenant against everyone but those who are mentally handicapped. I don't think the Constitution of the

> United States will allow this Court or will allow the Virginia legislature to do that.

Pet. App. at 67a. Recognizing this discussion, respondents carefully argue in their Brief in Opposition that "Petitioner" failed to discuss its equal protection claim. Respondents do not and cannot argue that there was no discussion of Omega's equal protection claim as the waiver rule expressly requires.

Respondents' characterization of Omega's equal protection claim as part of a "shot gun approach" is misleading. Omega had two and only two Questions Presented before the Supreme Court of Virginia:

> 1. Whether Judge Gates has properly interpreted the single-family dwelling requirement in the Providence Pines and Scottingham Restrictive Covenants. (Assignments of Error 1 and 2)

2. Whether enforcement of the restrictive covenants as interpreted by Judge Gates results in a denial of equal protection in violation of the United States Constitution. (Assignment of Error 3)

Questions Presented, Omega's Brief in the Supreme Court of Virginia, page 3. Indeed, counsel for respondents considered Omega's equal protection claim to be so central to the issues in the case that he discussed it himself during oral argument before the Virginia Supreme Court.

During oral argument, counsel for Omega spent a substantial portion of his allotted time discussing the discriminatory nature of excluding Omega's proposed homes while allowing other groups of unrelated persons and households with maids, governesses and the like. Counsel for respondents explicitly criticized Omega's

equal protection claim. The Virginia Supreme Court chose to avoid dealing with Omega's federal Constitutional rights and therefore declared they had been waived. That ruling does not bind this Court. Rogers v. Alabama, 192 U.S. 226, 230-31 (1904); Nickel v. Cole, 256 U.S. 222, 225 (1921).

Respondents' argument that the Virginia judgment rests on adequate and independent state grounds is simply incorrect. The very rule of Virginia law which the Virginia Supreme Court created, namely the definition of "family", gives rise to the federal issue.

As argued in Omega's Petition, the Virginia Supreme Court's exclusion of Omega's proposed homes from its definition

of single-family dwellings is a denial of equal protection.

CONCLUSION

Omega's Petition for Writ of Certiorari to the Supreme Court of Virginia should be granted.

Respectfully submitted,

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January 16, 1984

CERTIFICATE OF SERVICE

I hereby certify that three copies of this Petition for a Writ of Certiorari to the Supreme Court of Virginia with Appendix were mailed by depositing the documents in a United States Post Office with first-class postage prepaid, addressed to N. Leslie Saunders, Jr., Esq., Saunders, Hundley & Gilliam, 2500 Pocoshock Place, P. O. Box 35001-C, Richmond, Virginia, 23235, counsel of record for Respondents, on this 16th day of January, 1985.

Anne Marie Whittemore